Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

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BARRY WARREN KIBBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert J. Henderson, Superintendent of Auburn Correctional Facility, Auburn, New York, prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, dated April 8, 1976, which granted respondent Kibbe's habeas corpus application to the extent of reversing his conviction for second degree murder. This decision reversed the judgment of the United States District Court for the Northern District of New York, dated June 27, 1975, which denied the application.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reproduced herein as Appendix "A" (1a-17a). The amendment to the judgment and opinion is not yet reported

and is reproduced herein as Appendix "B" (18a-19a). The opinion of the District Court is unreported and is reproduced herein as Appendix "C" (20a-23a).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on April 8, 1976. A timely petition for rehearing or rehearing *en banc* was denied on May 21, 1976.

Question Presented

1. Did the Court of Appeals err in reversing a state murder conviction on the basis of an alleged omission in the jury instruction when the Court did not evaluate the instruction in the context of the entire proceeding, as required by fundamental principles of habeas corpus review as well as prior decisions of this Court.

State Statute Involved

New York Penal Law:

"§ 125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

• • •

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person;"

Statement of the Case

A. Introduction

Petitioner is presently confined pursuant to a judgment of conviction for the crimes of murder in the second degree, robbery in the second degree, and grand larceny in the third degree, rendered by the Monroe County Court after a trial by jury. Petitioner was sentenced to 15 years to life on the murder count, 5-15 years on the robbery count, and up to 4 years on the grand larceny count. His conviction was affirmed, with opinion, by the Appellate Division, *People* v. *Kibbe*, 41 A D 2d 228, 342 N.Y.S. 2d 386 [4th Dept. 1973], and the Court of Appeals. 35 N Y 2d 407, 362 N.Y.S. 2d 848, 321 N.E. 2d 773 (1974).

B. The Crime

On December 30, 1970, the victim of this crime, one George Stafford, was drinking heavily in a Rochester bar with petitioner and his co-defendant, Roy Krall. Stafford inquired if anyone would give him a ride and petitioner and Krall, who had already decided to steal his money, agreed. After another few drinks in another bar, they entered petitioner's car at approximately 9:30 P.M.

While Krall drove, petitioner slapped Stafford several times and took his money. Petitioner made Stafford lower his trousers and take off his boots to prove that he had no more money. Stafford was then abandoned on the shoulder of a rural, two lane road, snow-banked on both sides. Stafford, still partially undressed, was left with his jacket and boots next to him; his eyeglasses remained in the car. The temperature was near zero and gusting winds at times obscured visibility, although it was not snowing. The road was not lighted and there were no nearby houses. The nearest structure was an open gasoline station approximately one quarter of a mile away on the other side of the highway.

William Blake, operating a pickup truck, was driving at 50 miles per hour, 10 miles over the speed limit, when two approaching cars flashed their headlights at him. Immediately thereafter he saw Stafford sitting in the middle of the road. Blake went into shock and did not have time to react; he hit Stafford. He stopped to aid Stafford, who was not wearing his jacket or boots. Stafford died shortly thereafter of massive head injuries. Tests revealed a high degree of intoxication.

C. The Trial and Charge

Petitioner and his co-defendant were indicted, *inter alia*, for murder in the second degree, N.Y. Penal Law § 125.25 (2), which provides that a person is guilty of murder when:

> "2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

In his opening statement, the prosecutor specifically argued that defendants' acts, while not the sole cause of death, were nonetheless responsible for and a cause of death. (T. 607-608).* The jury had been instructed by the judge that the opening statement was to be considered a preview of what each side intends to prove.

The trial strategy of the defense was:

> ". . . to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation

* Numbers in parentheses preceded by the letter "T" refer to the state trial transcript. The relevant portions of the transcript have been filed with the Clerk of this Court.

> of his truck and not the defendants' conduct." Court of Appeals Opinion, a.*

To this end defense counsel conducted a vigorous cross-examination of Blake and the Medical Examiner (see 7a). Additionally, counsel had made a pre-trial motion to dismiss the indictment on the ground of inadequate causation; the motion was renewed at the close of the prosecution's case (see 7a-8a). The motions were denied.

The trial court instructed the jury that the arguments of counsel were "advanced for your help in reaching a fair and just verdict" and could be followed by the jury as long as they were based on evidence received (T. 1173). In his summation petitioner's counsel repeated and accented the elements of second degree murder (T. 1094). Co-defendant's counsel argued that if there were any depraved indifference to human life it was on the part of Blake, who "caused" Stafford's death (T. 1117-1118). Counsel described Blake's conduct and said "There you have the cause of death." (T. 1118). See also T. 1125.

In his summation the prosecutor repeatedly argued that defendants' reckless conduct caused Stafford's death (T. 1132-1134, 1155) and that defendants could have anticipated the risk of death by a vehicle (T. 1152-1155). He further argued that these acts caused Stafford's death even though there "were not the only, the direct or most preceding cause of his death" and gave an example of an intervening cause which would not negate the original actor's responsibility for ensuing death (T. 1155-1157).

The jury was then charged by the trial judge. The Court reread the indictment. The count charging second degree murder tracked the language of § 125.25(2) of the

* Numbers followed by the letter "a" refer to the pages of the appendices annexed hereto.

Penal Law (T. 1162). The Court also stated that the jury could follow the arguments of counsel in reaching its verdict, as long as they were based on evidence received (T. 1173). The Court defined the terms "recklessly," "depraved," "grave," and "indifferent" (T. 1187-1189) but did not specifically define "cause." The jury was instructed that to convict the defendants of a crime, "all" elements of the crime must be proved beyond a reasonable doubt (T. 1189). Immediately after this instruction, the judge reiterated the elements of second degree murder (T. 1190). In briefly summarizing the evidence, the judge pointed to evidence regarding the "death or running into of George Stafford in the East River Road by an automobile—truck or light truck" (T. 1197).

Additionally, upon its own request, the jury was given a copy of the indictment so it would have all the language of the various counts before it (T. 1209; see T. 1204-1206). As previously stated, the indictment followed the language of the statute. The judge stated:

> "This copy of the indictment is given to you only so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." (T. 1209).

When the jury returned a few hours later and requested an explanation of all four counts, the Court repeated the exact language of § 125.25(2) and said:

> "*All* of these factors must coincide to render a person guilty of murder under that section." (T. 1916) (emphasis added).

Petitioner was apparently satisfied that the issue of causation was sufficiently and properly before the jury since he made no objection to the charge and made no request for a separate instruction on causation.

D. Prior State Proceedings

Petitioner's judgment of conviction was affirmed on appeal. Petitioner's brief to the Appellate Division did not challenge the jury charge. Petitioner simply argued that there was insufficient evidence to support a conviction for murder in the second degree, contending that the victim's death was caused by the truck driver, not petitioner. The dissenting judge in the Appellate Division *sua sponte* raised the issue of the jury charge on causation and held that he would reverse in the interest of justice (N.Y. Crim. Proc. Law § 470.15[3][c], [6][a]) because the instruction was inadequate. *People* v. *Kibbe, supra,* 41 A D 2d at 230-233. Because of this dissent the majority considered the charge in the "interest of justice" and held the charge adequate although lacking in detail, noting that petitioner had not objected at trial, made any request at trial, nor challenged the charge on appeal. *Id.* at 230.

The Court of Appeals refused to disturb the Appellate Division's discretionary determination that the conviction would not be reversed in the interest of justice, also noting that no exception or request with respect to the charge on causation had been made in the trial court. *People* v. *Kibbe, supra,* 35 N Y 2d at 413-414.

E. Federal Proceedings

Petitioner's habeas corpus application to the United States District Court for the Northern District of New York was denied on June 27, 1975 (20a-23a). As to the challenge to the jury instructions, the Court held that the claim did not raise a question of federal constitutional dimensions (21a).

In a two-one decision dated April 8, 1976, the Court of Appeals reversing, granting the writ as to the murder con-

viction (1a-17a).* The majority of the panel reasoned that the failure of a trial court to adequately instruct a jury on any element of the crime deprives the defendant of his right to have the jury apply the reasonable doubt standard to that element and make a finding that the proof on that element is sufficient beyond a reasonable doubt (9a-13a).

The majority did not evaluate the challenged instruction within the context of the entire charge and the entire trial as required by this Court's decision in *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Indeed, although *Cupp* was not even cited by the Court, the Court specifically disavowed this approach, since it refused to assess the contested instruction in light of the evidence before the jury and the arguments of counsel, while recognizing that they raised the issue of causation (7a-8a, 10a, n.5).

Rather, the Court faulted the trial judge for his failure to define causation when he defined the other elements of the crime. The Court speculated that the jury may have concluded that the issue of causation may not have been before it or that it could infer causation from the chronological sequence of events (10a). Alternatively, even if the jury were aware of its duty to determine causation, the majority thought that the instruction was inadequate to the task because the legal standard was complex (10a-12a). The Court reasoned that with a proper instruction as to intervening and supervening cause, that is, foreseeability, the jury might have found that petitioner did not foresee or could not have foreseen that the victim would have been struck by a truck (13a).

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* Petitioner also claimed that certain evidence admitted at trial should have been suppressed. Assuming *arguendo* the issue cognizable on habeas corpus (see *Wolff* v. *Rice*, 44 U.S.L.W. 3485 [March 2, 1976]), the Court held that it was without merit (3a, n.1).

The dissent (14a-17a) held that the challenged charge did not reach constitutional dimensions entitling the petitioner to habeas corpus relief. Against the background of the summations and the overall charge, the dissent found that the jury was plainly aware of the necessity of finding that petitioner's conduct was the cause of death, although it may not have been the only cause. "In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business." (16a). Accordingly, the absence of a more definitive instruction on the element of causation did not raise an issue of fundamental fairness sufficient to reverse a state conviction in a federal habeas corpus proceeding.

Reasons for Granting the Petition for Certiorari

A. The Court of Appeals' refusal to evaluate the challenged jury instruction in the context of the trial and the entire charge is in direct conflict with decisions of this Court and that circuit.

Ordinarily, a challenge to a jury instruction given in a state criminal trial will not be reviewed by the federal courts. *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *United States ex rel. Stanbridge* v. *Zelker*, 514 F. 2d 45, 50 (2d Cir. 1975); *United States ex rel. Smith* v. *Montanye*, 505 F. 2d 1355, 1359 (2d Cir. 1974); *Schaefer* v. *Leone*, 443 F. 2d 182, 184 (2d Cir.), *cert. den.* 404 U.S. 939 (1971).

The only exception to the rule is a case in which the fundamental fairness of the entire proceeding was infected by the contested instruction. E.g. (*Cupp* v. *Naughten* [*"Cupp"*], 414 U.S. 141, 147 [1973]), for example, where the instruction shifted the prosecution's burden of proof or undermined the presumption of innocence (see *post* at 12-13). The exceptional case can be made out only by analyzing the instruction under the precise standard set forth by this Court in *Cupp*. In the instant case the Court of Appeals failed to make such an analysis.

This Court's mandate in *Cupp* was clear:

> "In determining the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States,* 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." *Cupp,* 414 U.S. at 147.

Accord, United States v. *Park,* 421 U.S. 616, 44 L. Ed. 2d 489, 502-503 (1975). See *Boyd* v. *United States,* 271 U.S. 104, 107 (1926).*

Indeed, the Court of Appeals for the Second Circuit has enunciated this same rule with regard to its own appeals. E.g. *United States* v. *Evans,* 484 F. 2d 1178, 1187-1188 (2d Cir. 1973); *United States* v. *Adreadis,* 366 F. 2d 423, 434 (2d Cir. 1966). Certainly state convictions cannot be measured by any stricter test on collateral federal review. Cf. *Henderson* v. *Morgan,* —— U.S. ——, 44 U.S.L.W. 4910, 4914 (June 17, 1976) (REHNQUIST, J.,

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* Conversely, recognition that a jury will consider the entire proceeding, despite instructions to the contrary, was the basis for this Court's holding in *Bruton* v. *United States,* 391 U.S. 123 (1968).

dissenting) (". . . certainly no more stringent a standard could be applied as a matter of constitutional law on federal habeas review of state convictions [than in federal cases]").

In the instant case the Court of Appeals effectively disavowed the holding of *Cupp* (which the majority did not even cite) since it refused to evaluate the challenged charge in the context of the entire proceeding but rather considered it in isolation. This was so despite the Court's stated recognition that the defense cross-examination as well as the summations raised the issue of the cause of the victim's death (7a-8a, 10a, n.5).

The issue of causation was raised by the prosecutor in his opening statement and by both the defense counsel and the prosecutor in their summations, as well as by the evidence before the jury. Additionally, the jury had the indictment (which tracked the language of the statute) before it and was instructed by the trial court that it must find every element against petitioner beyond a reasonable doubt (*ante* at 4-6). Accordingly, had the majority evaluated the allegedly ailing instruction in light of the evidence, arguments of counsel, and the overall charge, it would have been apparent that the jury's attention was adequately focused on the necessity of finding that petitioner's acts caused the victim's death.* See *United States* v. *Park, supra,* 44 L. Ed. 2d at 502. As the dissent stated: "the court's instruction was sufficient to enable the jury intelligently to go about its business." (16a). See *Lyons* v. *Oklahoma,* 322 U.S. 596, 601 (1944) (Specificity of state

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* Here, as in *Boyd* v. *United States, supra,* 271 U.S. at 107-108, petitioner's counsel (whose competency is unchallenged) raised no objection to the charge as given and made no requests, nor did he challenge the charge in his brief to the Appellate Division. The charge was obviously regarded as satisfactory to put the issue before the jury.

court charge is a matter of state procedure as long as it fairly raises the issue).

The Court of Appeals' decision should be reviewed because it is in direct conflict with this Court's holdings as well as its own decisions. The decision establishes bad precedent for future review of challenged jury instructions, particularly in federal habeas review of state convictions where the yardstick for measuring due process claims is fundamental unfairness. See Point B, *post*.

B. The opinion of the Court of Appeals conflicts with and undermines the rule that a state petitioner must show fundamental unfairness to prevail in a federal habeas corpus proceeding.

The yardstick for measuring a due process challenge to a state criminal trial is the "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). The jury instruction test propounded by this Court in *Cupp* is precisely adapted to this end. It requires that the challenged instruction be evaluated in the context of the whole proceeding to ascertain if it "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. See also *Pleas* v. *Wainwright*, 441 F. 2d 56, 57 (5th Cir. 1971); *Byrd* v. *Hopper*, 402 F. Supp. 787, 788 (N.D. Ga. 1975); *United States ex rel. Birch* v. *Fay*, 190 F. Supp. 105, 107 (S.D.N.Y. 1961).

In fact, those cases which have reached this Court have involved specific instructions by the trial judge on the issues of presumption of innocence or burden of proof, matters which clearly might affect the fundamental fairness of a criminal trial. In *Cupp*, the challenged portion of the charge was a "presumption-of-truthfulness" instruction which petitioner claimed shifted the State's burden to prove guilt beyond a reasonable doubt. 414 U.S. at 142-145. Similarly, in *Cool* v. *United States*, 409 U.S. 100

(1972), a charge that an accomplice's testimony should be credited if believed beyond a reasonable doubt was challenged and sustained on the ground that it collided with the presumption of innocence and lessened the Government's burden of proof. *Id.* at 104.•

Since the federal habeas courts review only for violations of federal constitutional standards and not to retry cases *de novo* (*Milton* v. *Wainwright*, 407 U.S. 371, 377 [1972]; *Schaefer* v. *Leone*, *supra*, 443 F. 2d at 184), the Court of Appeals evaluation of the challenged charge in "artificial isolation" (*Cupp*, 414 U.S. at 147) not only conflicts with this Court's earlier decisions but also undermines fundamental principles of habeas corpus review.

The erosion of the fundamental unfairness standard in habeas review is an injustice to the federal judiciary as well as to the States. The decision of the majority opens the doors of the federal habeas courts to hundreds of state prisoners who can now claim that the charge in their trials contained a defective or inadequate instruction on a material element of the crime, and that accordingly, that element of the crime was not properly before the jury for a finding beyond a reasonable doubt. That few of these petitioners might prevail is of little moment to the courts who must decide the cases, or to the state attorneys who must read the transcripts and file a response. Cf. *Schaefer* v. *Leone*, *supra*, 443 F. 2d at 184.

In the instant case, the lack of detail by the trial court on the word "cause", conceded by the state appellate courts (*People* v. *Kibbe*, 41 A D 2d at 230; 35 N Y 2d at 414), raises at most a question of state law error. In no event

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• In *United States* v. *Park*, *supra*, 44 L. Ed. 2d 489 and *Boyd* v. *United States*, *supra*, 271 U.S. 104, this Court was acting in its supervisory authority over the federal courts in reviewing other types of charges given in federal trials.

is this a case in which an error has fatally infected the trial, "necessarily" preventing a fair trial. *Lisenba* v. *California, supra,* 314 U.S. at 236. The failure of the Court of Appeals to evaluate the challenged instruction in the context of the entire trial and its concomitant failure to analyze for fundamental unfairness in the trial is a disservice to the basic principles governing the application of the Due Process Clause and to the tenets underlying habeas corpus jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York, June 30, 1976.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, April 8, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 554—September Term, 1975.

(Argued January 16, 1976 Decided April 8, 1976.)

Docket No. 75-2128

BARRY WARREN KIBBE,

Petitioner-Appellant,

—v—

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Before:

LUMBARD, SMITH and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge,* denying petition for habeas corpus. Petitioner claims that trial judge's incomplete instructions to jury constitute a denial of due process.

Reversed.

SHEILA GINSBERG, Esq., New York, New York
(William J. Gallagher, Esq., The Legal Aid

Society, Federal Defender Services Unit, New York, New York, on the brief), *for Petitioner-Appellant.*

BARBARA SHORE RESNICOFF, Assistant Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, First Assistant Attorney-General, on the brief), *for Respondent-Appellee.*

LUMBARD, *Circuit Judge:*

After a jury trial in New York's Monroe County Court, Barry Warren Kibbe was found guilty on November 30, 1971 of murder, robbery in the second degree and grand larceny in the third degree. He brings this appeal from an order of the Northern District denying his petition for habeas corpus which was sought, in part, because the trial judge failed to charge the jury with respect to causation of death on the murder count. The bizarre circumstances that prompted Kibbe's apprehension and conviction for murder present one of those rare cases in which a habeas corpus petition pursuant to 28 U.S.C. §2254 genuinely puts at issue the guilt or innocence of an accused. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250-75 (1973) (Powell, *J.*, concurring); *Ralls* v. *Manson,* 503 F.2d 491, 494-99 (2d Cir. 1974) (Lumbard, *J.*, concurring). We hold that the trial judge's instructions permitted the jury, in its fact-finding process to disregard Kibbe's colorable claim that, as to the murder charge, his actions had not caused the death of a decedent and thus violated Kibbe's constitutional right to have every element of the crime with which he was charged proven beyond a reasonable

doubt. We therefore grant the writ with respect to the murder count.[1]

Kibbe and his codefendant, Roy Krall, met the decedent, George Stafford, at a bar in Rochester, New York on the evening of December 30, 1970. Stafford had been drinking heavily and by about 9:00 p.m. he was so intoxicated that the bartender refused to serve him further. Apparently the defendants saw Stafford offer a one hundred dollar bill for payment, which the bartender refused. At some point during the evening, Stafford began soliciting a ride to Canandaigua from the other patrons in the bar. Kibbe and Krall, who confessed to having already decided to rob Stafford, offered a ride and the three men left the bar together. Before starting out for Canandaigua, the three visited a second bar. When the bartender at this bar also refused to serve Stafford because of his inebriated condition, the three proceeded to a third bar, where each was served additional drinks.

Kibbe, Krall and Stafford left for Canandaigua in Kibbe's car about 9:30 that evening. According to statements of the defendants, as Krall was driving the car, Kibbe demanded Stafford's money and, upon receiving it, forced Stafford to lower his trousers and remove his boots to prove he had no more. At some time between 9:30 and 9:40 p.m., Stafford was abandoned on the side of a unlit, rural two-lane highway. His boots and jacket were also placed on the shoulder of the highway; Stafford's eyeglasses, however, remained in the car. There was testimony that it was "very cold" that night and that strong

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1 Kibbe also claims that the writ should issue because certain evidence admitted at trial was seized in violation of the Fourth Amendment proscription against unreasonable seizures. Even if Fourth Amendment claims are cognizable on habeas corpus, a matter presently before the Supreme Court, see *Wolff* v. *Rice,* 44 U.S.L.W. 3485 (U.S. March 2, 1976), we would find this claim to be without merit.

winds were blowing recently fallen snow across the highway, although the night was clear and the pavement was dry. There was an open and lit service station in the general vicinity, but testimony varied as to its precise distance from the place where Stafford was abandoned. In any case, the station was no more than one-quarter of a mile away.

About half an hour after Kibbe and Krall had abandoned Stafford, Michael Blake, a college student, was driving his pickup truck northbound on the highway at 50 miles an hour, ten miles per hour in excess of the posted speed limit. A car passed Blake in a southbound direction and the driver flashed his headlights at Blake. Immediately thereafter, Blake saw Stafford sitting in the middle of the northbound lane with his hands in the air. Blake testified that he "went into a kind of shock" as soon as he saw Stafford, and that he did not apply his brakes. Blake further testified that he did not attempt to avoid hitting Stafford because he "didn't have time to react." After the collision, Blake stopped his truck and returned to assist Stafford, whereupon he found the decedent's trousers were around his ankles and his shirt was up to his chest. Stafford was wearing neither his jacket nor his boots.

Stafford suffered massive head and body injuries as a result of the collision and died shortly thereafter. An autopsy revealed a high alcohol concentration of .25% in his blood. The Medical Examiner testified that these injuries were the direct cause of death.

Kibbe and Krall were apprehended on December 31, 1970. They were tried for robbery and for the murder of Stafford under New York Penal Law §125.25(2) which provides:

A person is guilty of murder in the second degree when:

* * *

(2) Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.[2]

In his charge to the jury, the judge failed to define or explain the issue of causation as that term is used in §125.25(2). No mention was made of the legal effect of intervening or supervening cause. Nevertheless, defense counsel failed to take any exception whatsoever to this omission. The jury returned guilty verdicts on the charges of second degree murder, second degree robbery, and third degree grand larceny. Kibbe was sentenced to concurrent terms of imprisonment of 15 years to life on the murder conviction, 5 to 15 years on the robbery conviction, and up to 4 years on the grand larceny conviction.

The Appellate Division affirmed the conviction on finding that there was sufficient evidence that Stafford's death was caused by appellant's acts "as well as by the acts of Blake." The court stated that while the trial judge's charge concerning causation was "lacking in detail" appellant had not questioned the sufficiency of the charge on appeal and no exceptions to or requests for a charge on causation had been made at trial. *People* v. *Kibbe*, 41 App. Div. 2d 228 (4th Dept. 1973). Justice Cardamone dissented on the ground that the issue of causation should have been submitted to the jury. The New York Court of Appeals also found sufficient evidence of causation and unanimously affirmed the convictions. *People* v. *Kibbe*, 35 N.Y.2d 407

2 Intent to kill is not a requirement under the statute.

(1974). Although the sufficiency of the charge was argued before the Court of Appeals, the court held that it was within the Appellate Division's discretion to refuse to reverse on those grounds.

Kibbe then petitioned for habeas corpus in the District Court for the Northern District. Judge Foley denied the petition and, on the question of the jury charge, noted that the correctness of instructions does not raise a constitutional claim cognizable on habeas corpus.[3] Appeal to this court followed.

Deliberate Bypass

The state appellate courts declined to consider the sufficiency of the trial judge's charge because appellant failed at trial to take an exception to or make a request for an instruction respecting causation. Mindful of the limited role that federal courts must play in reviewing the convictions of state prisoners, we may inquire further regarding Kibbe's claims only if his omission did not constitute a deliberate bypass of the orderly procedures of the state courts.[4] *Fay* v. *Noia*, 372 U.S. 391 (1963).

This court has not hesitated to find a deliberate bypass that precludes federal habeas corpus relief when failure to make a contemporaneous objection, mandated by the state's valid procedural rules, comported with trial strat-

3 Judge Foley cited *United States ex rel. Mintzer* v. *Dros*, 403 F.2d 42 (2d Cir. 1967) for this proposition. In that case, however, the court held only that the specific objections there at issue failed to raise questions of constitutional dimension.

4 The interest of the state in protecting its procedural rules seems somewhat diminished here by the fact that on this appeal the Attorney General of New York has not even argued or briefed the theory that Kibbe deliberately bypassed his right to object to the trial judge's charge. See Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact Finding Responsibility, 75 Yale L.J. 895, 961-62 (1966).

egy contrived by the defendant and his counsel. See *United States ex rel. Terry* v. *Henderson*, 462 F.2d 1125 (2d Cir. 1972); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); *United States ex rel. Schaedel* v. *Follette*, 447 F.2d 1297 (2d Cir. 1971). In *Cruz*, for instance, where appellant had failed at trial to object to the admissibility of an allegedly coerced confession, the court determined that it was the deliberate and consistent trial strategy of the defense not to question the voluntariness of the defendant's statement. 448 F.2d at 673. It was found that questioning the validity of the confession would have conflicted with the defense tactic of conceding the defendant's act but asserting the existence of mitigating circumstances. Thus, the deliberate bypass of a contemporaneous objection precluded later habeas relief.

This case, however, presents a wholly different situation. It is clear from the 1300 pages of pre-trial and trial transcript that the defense strategy was to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation of his truck and not the defendants' conduct. Prior to commencement of trial, Kibbe's counsel unsuccessfully moved to dismiss the indictment on the ground that the grand jury testimony dealing with the murder count revealed that defendants had left Stafford off the road and that he had been killed by a collision in the middle of the highway. Counsel for both Kibbe and Krall cross-examined Blake extensively on the speed he was traveling, the weather and road conditions, and his reactions after he spotted Stafford in front of him. The attorneys also vigorously questioned the Medical Examiner to establish that the collision was the immediate cause of Stafford's death. At the close of the prosecution's case, counsel renewed the motion to dismiss the murder count. Attorneys for both Kibbe and Krall argued the motion in

terms of the prosecution's failure to demonstrate the necessary causation. Krall's attorney stated:

> It's our contention that the People's proof has failed to prove the guilt of the defendant beyond a reasonable doubt as a matter of law in connection with that count. The proof had been shown that the cause of death of this [decedent] was severe injuries sustained through being struck by an automobile which the driver of which testified to operating it at a speed of 50 miles an hour in a 40-mile an hour zone. That he saw this form on the roadway when a hundred, two hundred feet away and made no effort to avoid it because, as he said, he was shocked and therefore did not apply the brakes and did not swerve his wheels in an effort to avoid this man. The defendant Roy Krall was under no obligation to anticipate a result like that.

Kibbe's attorney joined in the motion with a similar argument. The motion to dismiss was renewed and denied once more at the close of the entire case.

In their summations to the jury, defense counsel again argued that insufficient proof of causation required a judgment of acquittal on the murder charge. Kibbe's counsel maintained that the evidence failed to demonstrate that Stafford was left in a helpless condition and that some of the indications of helplessness, e.g., the disarray of his clothing, may have been caused by the impact of the collision.

These constant references to causation indicate that Kibbe sought to convince the court and jury that his conduct was not the culpable factor in Stafford's death. Nevertheless, no objection was taken to the trial judge's failure to charge the jury on the question of causation. In light of the conscious trial strategy of the defense,

however, we believe that this omission was obviously inadvertent and does not constitute a deliberate bypass. See *United States ex rel. Schaedel* v. *Follette,* 447 F.2d 1297, 1300 (2d Cir. 1971). We therefore proceed to consider the merits of appellant's petition.

Error in the Instruction

Kibbe now contends that the question of causation was a pivotal issue at trial and that the judge's failure to instruct the jury with respect to that issue allowed the jury to convict without finding that every element of the crime had been proven beyond a reasonable doubt. On the limited and singular facts of this case, we agree.

In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship,* 397 U.S. 358, 364 (1970). It is the essence of a fair trial and of the right to jury trial that the jury apply the reasonable doubt standard to determine those issues of fact that bear on the elements of the offense, see *United States* v. *Screws,* 325 U.S. 91, 107 (1945); *United States* v. *Hayward,* 420 F.2d 142 (D.C. Cir. 1969), and presumably it is in accordance with this mandate that New York requires the trial judge to state to the jury "the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts . . . ." N.Y.C.P.L. §300.10 (McKinney 1971). See *People* v. *Walker,* 198 N.Y. 329, 334 (1910) (every essential element of a crime presents a question of fact for the jury's exclusive determination).

In this case, by the language of the statute, the state was bound to prove to the jury beyond a reasonable doubt that appellant evinced a depraved indifference to Staf-

ford's life, recklessly engaged in conduct that created a grave risk of Stafford's death, and thereby caused Stafford's death. The court scrupulously instructed the jury with respect to the meaning of "recklessly", "depraved", "grave", and "indifferent" as used in Penal Law §125.25(2). The omission of any definition of causation, however, permitted the jury to conclude that the issue was not before them or that causation could be inferred merely from the fact that Stafford's death succeeded his abandonment by Kibbe and Krall.

Even if the jury were aware of the need to determine causation,[5] the court's instruction did not provide the tools necessary to that task. The possibility that jurors, as laymen, may misconstrue the evidence before them makes mandatory in every case instruction as to the legal standards they must apply. See *United States* v. *Burse*, Docket

5 The trial judge made brief mention of the term "causation" in his charge when he stated: "You will not consider either (first degree manslaughter or second degree manslaughter) unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly." This instruction, however, was given in the context of explaining the relation between reckless conduct and manslaughter rather than in the context of a definition of causation. In fact, by emphasizing "recklessly", the judge may have implied that the jury could assume causation and had only to determine whether recklessness was involved.

The above recounting of numerous instances in which the defense attempted to shift responsibility for Stafford's death away from appellant suggests that the jury may have been aware of the necessity of finding that appellant's conduct was the cause of that death. The motions to dismiss for failure of the prosecution to demonstrate causation, however, were made outside the presence of the jury; although the defense also raised the causation question in summations, Kibbe's counsel began his summation by noting that his remarks did not constitute evidence and that the trial judge alone was responsible for instructing the jury regarding the law. In the absence of an instruction concerning causation, the jury was unlikely to make the inference that it was to determine the question of causation from hearing the statute read and from listening to the defense examination of witnesses. In any event, there was no detailed definition of causation commensurate with the definitions of other terms in the statute.

No. 75-1388 (2d Cir. Mar. 8, 1976), slip op. at 2509. Error in the omission of an instruction is compounded where the legal standard is complex and requires that fine distinctions be made. That is most assuredly the situation in this case. It has been held that where death is produced by an intervening force, such as Blake's operation of his truck, the liability of one who put an antecedent force into action will depend on the difficult determination of whether the intervening force was a sufficiently independent or supervening cause of death. See W. LaFave & A. Scott, Criminal Law 257-63 (1972) (collecting cases).[6] The few

6 The complexity of the definition of legal causation in LaFave and Scott, supra, demonstrates that an explanation of the concept of intervening and supervening cause would have been not merely helpful (as contended by Judge Mansfield), but essential to the jury's determination here. Given the proper standard for causation, the jury could have found that Blake had been so reckless as to absolve defendants of legal responsibility for Stafford's death:

> As might be expected, courts have tended to distinguish cases in which the intervening act was a *coincidence* from those in which it was a *response* to the defendant's prior action. An intervening act is a *coincidence* when the defendant's act merely put the victim at a certain place at a certain time, and because the victim was so located it was possible for him to be acted upon by the intervening cause. The case put earlier in which B, after being fired upon by A, changed his route and then was struck by lightning is an illustration of a coincidence. However, it is important to note that there may be a coincidence even when the subsequent act is that of a human agency, as where A shoots B and leaves him lying in the roadway, resulting in B being struck by C's car; or where A shoots at B and causes him to take refuge in a park, where B is then attacked and killed by a gang of hoodlums.
>
> By contrast, an intervening act may be said to be a *response* to the prior actions of the defendant when it involves a reaction to the conditions created by the defendant.
>
> Thus—though the distinction is not carefully developed in many of the decided cases—it may be said that a coincidence will break the chain of legal cause unless it was foreseeable, while a response will do so only if it is abnormal (and, if abnormal, also unforeseeable).
>
> • • •
>
> This kind of accident must be distinguished from a somewhat different situation, as where A, with intent to kill B, only wounds

cases that provide similar factual circumstances suggest that the controlling questions are whether the ultimate result was foreseeable to the original actor and whether the victim failed to do something easily within his grasp that would have extricated him from danger.[7]

The New York appellate courts applied these standards and found that there was sufficient evidence to uphold the convictions. We have no reason to doubt that conclusion. There was evidence that Kibbe and Krall left Stafford near traffic and in an intoxicated condition without eyeglasses or sufficient clothing on a winter evening, and all of this could be considered to determine causation. The sufficiency of the evidence, however, is not the subject of our inquiry. Our sole concern is whether the jury was adequately instructed in order to make the same finding beyond a reasonable doubt. As this function was within

B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration.[73]

[73] *People* v. *Fowler*, 178 Cal. 657, 174 P. 892 (1918). Perhaps if C were driving in a reckless way, A would not be liable. If A in the Fowler case had merely an intent to injure, but not to kill, A would be guilty of manslaughter; but no doubt A, having put B in an unconscious or helpless position on a dark road, has an affirmative duty to act to pull him off the road, and failure to act under the circumstances where A knows death is substantially certain to occur (or even where he realizes there is a very high risk though no certainty of such death) should make him guilty of murder of the intent to kill (or of the depraved heart) variety.

Without a proper definition of causation, the jury, if it considered causation at all, could have found that Blake's conduct, no matter how reckless, could merely supplement and not supervene defendants' culpability.

7 See *State* v. *Preslar*, 38 N.C. Rep. 417 (1856) (deliberate choice of victim to forego place of safety exonerates defendant of liability for victim's subsequent death from exposure).

the exclusive province of the jury, the appellate courts may not substitute their own findings for the jury's possible failure to consider the issue. See *United States* v. *Howard*, 506 F.2d 1131, 1134 (2d Cir. 1974). There was evidence that Kibbe and Krall abandoned Stafford near an open and lit service station and that although Stafford was intoxicated he was not helpless. It also appeared that Blake was less than diligent in the operation of his motor vehicle. If the jury had been cognizant of the proper legal standards, this evidence, if believed, could have injected an element of reasonable doubt into the jury's deliberations as to whether defendants foresaw or could have foreseen that about one-half hour after they abandoned Stafford he would be struck in the middle of a highway lane by the driver of a speeding truck who failed to react in such a way to avoid a collision.

We are convinced that the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process. See *United States ex rel. Smith* v. *Reincke*, 239 F. Supp. 887 (D. Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965); cert. denied, 384 U.S. 993 (1966). See also *United States* v. *Singleton*, Docket No. 75-1114 (2d Cir. Feb. 13, 1976); *United States* v. *Hines*, 256 F.2d 561, 564 (2d Cir. 1958). Since the error in the instruction reaches constitutional dimensions, it may be corrected on habeas corpus. ~~*Kenion* v.~~ *Gill*, 155 F.2d 176 (D.C. Cir. 1946). We are therefore compelled to grant the writ with respect to the murder conviction.

Appendix A.

MANSFIELD, *Circuit Judge* (Dissenting):

With due respect I must dissent because in my view the deficiency in the trial judge's instruction regarding causation did not reach constitutional dimensions entitling the petitioner to federal habeas relief. See *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973); *Schaefer* v. *Leone*, 443 F.2d 182 (2d Cir. 1971).

There was ample evidence to support a finding by the jury beyond a reasonable doubt that the defendants were guilty of murder in violation of N.Y. Penal Law §125.25(2). The proof was clear that the defendants evidenced a depraved indifference to human life and that they recklessly engaged in conduct which not only created a grave risk of death to the victim, George Stafford, but was a direct cause of his death. See *People* v. *Kibbe*, 35 N.Y.2d 407, 362 N.Y.S.2d 848 (1974). On a dark, cold night (temperature 4°) the defendants placed their intoxicated victim into their automobile, drove away, robbed him and left him on a highway, with his boots off, his pants down or off, and stripped of eyeglasses he needed to be able to focus. They deserted him at a point about a quarter of a mile from the nearest shelter, a gasoline station located on the other side of the highway. It was readily foreseeable that in his condition Stafford might be struck and killed by a motorist, which is what happened.

The jury was well aware that it had to find beyond a reasonable doubt that the defendants' conduct was a direct cause of Stafford's death and that death was not attributable solely to the motorist. In his summation the prosecutor argued repeatedly that although the immediate or direct cause of the victim's death was the conduct of the motorist who struck him, the reckless conduct of the defendants was a substantial producing cause of his death because they were "bound to anticipate that he would be

Appendix A.

struck by a car, struck and killed by a car" and "these two defendants were aware of and consciously disregarded a substantial and unjustifiable risk that death would result." [1] In his summation one defense counsel conversely argued that the cause of death was not his client's conduct but that of the motorist.

Against this background the trial judge instructed the jury that a person is guilty of murder in violation of §125.25 when "under circumstances evincing a depraved indifference to human life he recklessly engages in conduct which creates a grave risk of death to another person. *And thereby causes the death of another person.*" (Emphasis added). Furthermore he instructed the jury that it could not consider the alternate crimes of man-

1 "There is one other aspect that I'd like to talk about on this first count, and also actually in regard to the second count. As I mentioned not only does the first count contain reference to and require proof of a depraved indifference to a human life, it proves that the defendant recklessly engaged in conduct which created a risk of death in that they caused the death of George Stafford. Now, I very well know, members of the jury, you know, that quite obviously the acts of both of these defendants were not the only the direct or the most preceding cause of his death. If I walked with one of you downtown, you know, and we went across one of the bridges and you couldn't swim and I pushed you over and you drowned because you can't swim, I suppose you can say, well, you drowned because you couldn't swim. But of course, the fact is that I pushed you over. The same thing here. Sure, the death, the most immediate, the most preceding, the most direct cause of Mr. Stafford's death was the motor vehicle, the truck driven by Mr. Blake that hit him right square, the middle of the grill. I think he said, that Mr. Stafford was seated or I forget how he described him, he's not standing up, or at least he's on his knees or he is sitting down with his hands up in the middle of the northbound lane. Sure, that's the most direct cause of death. But how did he get there? Or to put it differently, would this man be dead had it not been for the acts of these two defendants? And I submit to you, members of the jury, that the acts of these two defendants did indeed cause the death of Mr. Stafford. He didn't walk out there on East River Road. He was driven out there. His glasses were taken and his identification was taken and his pants were around his ankles." (Tr. 1155-57).

slaughter in the first degree or manslaughter in the second degree "unless you feel that these defendants or either of them, was guilty of causing the death of George Stafford recklessly."

No exception was taken by defense counsel to the charge as thus given by the court, and no question was raised as to the sufficiency of the charge on defendants' appeal to the Appellate Division, see *People* v. *Kibbe*, 41 App. Div. 2d 228, 342 N.Y.S.2d 386 (4th Dept. 1973). The adequacy of the instruction was first raised by the dissenting opinion of one justice of the Fourth Department.

Although it might have been helpful to the jury to have a more definitive instruction on the element of causation, including an explanation of the concepts of proximate, superseding, and intervening causation, I cannot agree with the majority that such a detailed instruction was constitutionally required or that the failure to give it permitted "the jury to conclude that the issue was not before them." We are not here dealing with such fundamental unfairness as failure to advise the jury that the defendant was presumed to be innocent or the substitution by the court in its instruction of a preponderance-of-the-evidence for a reasonable doubt standard, see *In re Winship*, 397 U.S. 358 (1970). Here the jury plainly was made aware by the summations of the necessity of finding that the defendants' conduct was the cause of the victim's death even though it may not have been the only cause. In these circumstances the court's instruction was sufficient to enable the jury intelligently to go about its business. It was readily apparent to the jury, without detailed instructions on the subject, that it could not find the defendants guilty if death was attributable entirely to some intervening force which superseded the defendants' recklessly indifferent conduct. As the New York Court of Appeals unanimously concluded in affirming the conviction, the evidence was

overwhelming that the defendants' conduct in depositing their intoxicated robbery victim on the highway in darkness and 4° weather, partially clothed and without eyeglasses, was the direct cause of his death.

> "The defendants do not dispute the fact that their conduct evinced a depraved indifference to human life which created a grave risk of death, but rather they argue that it was just as likely that Stafford would be miraculously rescued by a good samaritan. We cannot accept such an argument. There can be little doubt but that Stafford would have frozen to death in his state of undress had he remainded on the shoulder of the road. The only alternative left to him was the highway, which in his condition, for one reason or another, clearly foreboded the probability of his resulting death." 35 N.Y.2d at 407, 362 N.Y.S.2d at 852.

I cannot subscribe to the idea that on such a record they were denied any constitutional right by the brevity of the court's charge on causation. Their trial was a fair one.

APPENDIX B

Amendment to the Court of Appeals Opinion, May 4, 1976.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of May, one thousand nine hundred and seventy-six.

BARRY WARREN KIBBE,

Petitioner-Appellant,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated April 27, 1976 to amend the judgment of this court to include a provision that the writ is granted unless petitioner is re-tried within sixty (60) days from the date the judgment is filed be and it hereby is granted.

It is further ordered that the opinion of this court is amended to replace the last sentence of the majority

opinion with the following:

> "The writ is granted as to any detention arising from the murder conviction, unless retrial of the petitioner on said murder charge is commenced within 60 days from the date of the filing of this order."

/s/
J. Edward Lumbard

/s/
J. Joseph Smith

/s/
Walter R. Mansfield
Circuit Judges

APPENDIX C

Opinion of the United States District Court, June 27, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

75-CV-

UNITED STATES OF AMERICA, ex rel. BARRY WARREN KIBBE and ROY A. KRALL,

Relators,

against

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner Kibbe in this habeas corpus proceeding with a title joining Krall who was convicted and sentenced with him is an inmate of Auburn Correctional Facility. After a jury trial in Monroe County Court, petitioner was convicted of Murder in violation of N.Y. Penal Law, § 125.25, subd. 2; Robbery in the second degree; and Grand Larceny in the third degree. Under judgments of conviction entered November 30, 1971, petitioner was sentenced to concurrent terms of 15 years to life on the Murder conviction; 5 to 15 years on the Robbery conviction; and an indeterminate term up to 4 years on the Grand Larceny one. The conviction was affirmed on appeal, opinions being written both by the Appellate Division (41 A.D.2d 228, 4th

Dept. 1973), and the Court of Appeals (35 N.Y. 2d 407, 1974). Petitioner's brief in support of this petition is practically verbatim from his brief filed in the Court of Appeals, as indicated by the points of counsel found in the official New York Court of Appeals report at pp. 407-408, and compared with the brief filed in this federal court, beginning on p. 10.

The facts are set forth in detail by Judge Gabrielli in his opinion for the Court of Appeals, but shall be summarized again. Petitioner and a codefendant agreed to take the victim from a bar in Rochester to Canandaigua on a cold night in December 19[illegible]. The victim was very intoxicated. Petitioner and his codefendant partially undressed the victim, George Stafford, stole his money and then left him on the side of a lonely country road. A driver of a truck later that night saw the victim sitting in the northbound lane with his hands up in the air and could not stop the truck in time and ran Stafford down causing his death. Judge Gabrielli (p. 411) stated that the basic challenge in the New York Court of Appeals was to the murder conviction questioning whether the acts of defendants "caused the death of another" as required by statute.

Petitioner's first point is that the trial court's charge to the jury was defective, in that it failed to include an instruction on the element of causation and on petitioner's mental state. Both State appellate opinions reviewing the conviction discussed this point carefully. Both noted there were no exceptions or requests to charge on the cause of death issue by defense counsel. The correctness of a charge fails to raise a question of federal constitutional dimensions. United States ex rel. Mintzer v. Dros, 403 F.2d 42 (2d Cir. 1967). Where there is no showing that alleged errors in the charge were such as to deprive defendant of a federal constitutional right, the charge is not reviewable in a federal habeas corpus proceeding. Cupp v. Naughten, 414 U.S. 141 (1973).

Appendix C.

The second point urged by petitioner is that the evidence at the trial was insufficient to sustain the conviction for murder. Federal habeas corpus it is settled may not be used to test the sufficiency of the evidence. United States ex rel. Morton v. Mancusi, 393 F.2d 482 (2d Cir. 1968); cert. denied, 393 U.S. 927 (1968); United States ex rel. Sadowy v. Fay, 284 F.2d 426 (2d Cir. 1960).

The third point is that the court erred in denying petitioner's motions to suppress evidence (a $100 bill) and items seized from petitioner's vehicle. Errors in the admission or exclusion of evidence at a state trial form no basis for habeas corpus relief unless there is evident deprivation of a fundamentally fair trial and that has not been shown here. United States ex rel. Green v. McMann, 268 F. Supp. 529 (S.D.N.Y. 1967); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969). There is nothing offered of substance to indicate that there was not sufficient support for the State Court rulings that the $100 bill and items seized from the vehicle were other than voluntarily given or taken with consent and not illegally.

The trial court's refusal to grant petitioner a trial separate from his codefendant is within the court's discretion. There was no violation of the Bruton rule that could be considered prejudicial because petitioner's codefendant Krall testified at the joint trial. Bruton v. United States, 391 U.S. 123 (1968). It is not claimed the statements or confessions were not substantially the same or inconsistent. See United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir. 1971), cert. denied, 406 U.S. 932 (1972); United States ex rel. Ortiz v. Fritz, 476 F.2d 37 (2d Cir. 1973).

The final point is entitled: "The Court erred in not suppressing all or some of the petitioner's statements either as a product of a primary illegality or as not being made after proper advice or after a valid waiver." Point V, pp. 29-30, of petitioner's application casts doubt upon any contention that the principles of Miranda v. Arizona, 384 U.S.

Appendix C.

436 (1966), were violated. There was a waiver form involved and also oral warnings. Words which convey the substance of the Miranda warning are sufficient. United States v. Vanterpool, 394 F.2d 697, 698-99 (2d Cir. 1968). United States v. Lamia, 429 F.2d 373, 376-77 (2d Cir. 1970), cert. denied, 400 U.S. 907. Further, Judge Gabrielli in his opinion and Appellate Division Justice Henry stated flatly the statements of the petitioner and his codefendant were voluntary.

From my review of the state opinions and records furnished me, plaintiff fails in this respect to establish by convincing evidence that the factual determination of voluntariness made in the State courts is erroneous. LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Allen v. LaVallee, 411 F.2d 241, 244 (2d Cir. 1969). There is no showing of circumstances of the type that do give concern, such as prolonged questioning, physical abuse, lack of food or water, that might warrant finding the admissions and confessions were involuntary. There was adequate hearing under People v. Huntley, 15 N.Y. 2d 72 (1965), and there is no evident reason why the presumption of correctness should not apply. 28 U.S.C. 2254(d); United States ex rel. Rivera v. Follette, 395 F.2d 450 (2d Cir. 1968); United States ex rel. Coleman v. Mancusi, 423 F.2d 985 (2d Cir. 1970).

In my judgment the State trial and appellate determinations were fairly and carefully made and I am content to accept them. The petition shall be filed without payment of fee and is denied and dismissed for the foregoing reasons.

It is so Ordered.

Dated: June 27, 1975
Albany, New York.

/s/ James T. Foley
United States District Judge